
IN THE ⁷

**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

BOISE PAYETTE LUMBER COMPANY, a Cor-
poration, *Appellant*,

vs.

HALLORAN-JUDGE TRUST COMPANY, a Cor-
poration, as Trustee, *Appellee*.

Brief of Appellee

*On Appeal from the United States District Court,
District of Idaho, Eastern Division.*

HON. F. S. DIETRICH, *Judge*.

EDWIN SNOW,
Residence, Boise, Idaho,
Attorney for Appellee.

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The issue between the parties, and the statement of the facts raising such issue, are sufficiently and clearly stated in the brief of appellant.

The legal question involved hinges upon the construction of section 7345, Idaho Compiled Statutes, which provides:

“The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to

the time when the building, improvement or structure was commenced, work done, or materials furnished; also to any lien, mortgage or other encumbrance of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or materials were commenced to be furnished.”

The above section of the Idaho Statutes has been unequivocally construed by the Supreme Court of Idaho adversely to appellant's contention in the case of *Pacific States Savings Company v. DuBois*, 11 Ida. 319; 83 Pac. 513, in which case the writer of the Court's opinion said:

“It seems clear to me that, when mortgages and other liens are involved in the foreclosure of mechanics' and materialmen's liens, the time or date when the building was commenced, or the laborer begun to work, or the materialman commenced to furnish the material, must be taken into consideration in determining the priority of such liens over such mortgage lien. All liens for labor commenced and materials commenced to be furnished prior to recording said mortgages are prior and superior liens to said mortgages, and the liens of all laborers for labor commenced, and materialmen for material commenced to be furnished, subsequent to the

recording of said mortgages, are subordinate to said mortgages, when such work is done and material furnished by persons not theretofore connected with the construction of the building.”

The agreed statement of facts shows, of course, that appellee's mortgage was recorded January 26, 1920, and that appellant did not begin to furnish material until subsequent to April 1st, 1920. The trial court in the cause at bar considered that this construction of an Idaho statute by the highest Idaho Court was binding and controlling. (Memorandum decision, p. 13 tr.)

If further authority is necessary, it may be remarked that the State of Washington has a statute practically identical with section 7345, Idaho Compiled Statutes, and that section, (unlike California, for instance) is unmodified in its effect by the language of other sections of the statutes. The Supreme Court of the State of Washington has conclusively decided that under such a statute the priority of a lien dates from the beginning of the particular work for which the lien is claimed, or from the commencement of furnishing the particular material for which the lien is claimed.

Mechanics' Mill & Lumber Co. v. Denny Hotel Co. (Wash.) 32 Pac. 1073;

Keene Guaranty Sav. Bank v. Lawrence, (Wash.) 73 Pac. 680.

Appellant cites the case of *McClain v. Hutton*, 131 Cal. 132; 61 Pac. 273, and quotes from Bloom on Mechanics' Liens, sections 488 and 489, the language of the text writer being taken verbatim from the California decision first mentioned.

While it is true that the section of the California statute under discussion in the California decision (Sec. 1186, Kerr's Code of Civil Procedure) is identical with section 7345 of the Idaho statutes, the California law governing mechanics' liens contains additional provisions which are entirely missing from the Idaho statute. For instance, section 1183, Kerr's Code of Civil Procedure, provides:

"In case of a contract for the work between the reputed owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price, and after such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor."

It is accordingly apparent that under the California law the principal contract itself operates as a lien in favor of subcontractors, materialmen or laborers, and since the lien arises out of the principal contract it might be held to relate back to the date of the principal contract. There is no such provision in the Idaho statute. Generally speaking, we would

say that the doctrine announced by the Supreme Court of California in most of its decisions with respect to the relative priority of mortgages and mechanics' liens and construing that section of the California statute which is identical with the Idaho statute, is in harmony with *Pacific States Savings Company v. DuBois*, *supra*, decided by the Idaho Supreme Court, these California cases being fully discussed in that decision.

Certain Montana cases and certain Federal cases arising under the laws of Montana seem also upon first or casual reading to support appellant's contention. An examination of the Montana statute, however, shows that by its terms it gives priority to mechanics' liens over any mortgage "made subsequent to the commencement of work *on any contract* for the erection of such building."

In the case of *Merrigan v. English*, (Mont.) 22 Pac. 454, there is pointed out the significance of the words just above italicized. The Montana Court says:

"Section 1374 provides that the liens mentioned in section 1370 'shall be prior to and have precedence over any mortgage * * * made subsequent to the commencement of work on any contract for the erection of such building'. In California and other states the statutes on this subject read thus, 'subsequent to the commence-

ment of the work'. It is apparent that in such states the lien is not prior to those mortgages which are recorded prior to the commencement of the very work for which the lien is filed, so these authorities are not in point. * * *"

It must be pointed out that the agreed statement of fact nowhere discloses that the work under Wilkie's principal contract was commenced prior to the recording of the mortgage, or that work was begun on this contract or the material furnished by appellant without notice of a mortgage on the part of either or both Wilkie and appellant.

"The burden of proving that the building operations were commenced before the execution of a mortgage on the land is on the mechanic and in the absence of such proof the mortgage has priority."

Davis v. Alvord, 94 U. S. 545; 24 L. Ed. 283.

It seems conclusive that the decision of the trial Court is correct, and should be affirmed.

Respectfully submitted,

.....*Edwin Snow*.....

*Attorney for Appellee,
Halloran-Judge Trust Company.*